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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,
vs.
JACK W. HUSSEY,
Respondent.

No. 342.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of Southern Railway Company, a corporation, appellant, v. Jack W.

Hussey, appellee, which the petitioner herein seeks to have reviewed by this Court on certiorari, has not been as yet published in the federal reports, but is fully set forth in petitioner's printed transcript of the record herein on pages 151 to 159 thereof, inclusive.

II.

STATEMENT OF THE CASE.

Respondent Jack W. Hussey, as plaintiff, brought suit against this petitioner, Southern Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railways Company, in the Circuit Court of the City of St. Louis, Missouri, on January 19, 1928, to recover damages for personal injuries sustained by him while a passenger on one of petitioner's trains (Tr., pp. 2, 3). Thereafter, said cause was, upon the petition of the said defendants therein, removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (Tr., pp. 7, 8). The suit was subsequently dismissed as to said defendant Cleveland, Cincinnati, Chicago & St. Louis Railways Company (Tr., p. 14), and resulted in a verdict and judgment, in said District Court, in favor of this respondent, Jack W. Hussey, in the sum of $20,000.00 (Tr., pp. 19, 20), from which judgment this petitioner, Southern Railway Company, appealed to the United States Circuit Court of Appeals, for the Eighth Circuit, where, on June 26, 1930, at the May Term, 1930, of said court, said judgment was affirmed in an opinion

of said Court of Appeals written by the Honorable Kimbrough Stone, Circuit Judge, and concurred in by Judge Van Valkenburgh, Circuit Judge, and Judge Otis, District Judge (Tr., pp. 151 to 159, inclusive).

The amended petition of respondent (plaintiff below) on which the cause was tried, after formal allegations, alleges that respondent was a passenger on a train of petitioner, en route from Louisville, Kentucky, to St. Louis, Missouri, and that while respondent was such passenger and had reached a point near Princeton, Indiana, said train came into collision with another train, causing respondent to be thrown in and about the car in which he was riding, all of which occurred as the result of negligence and carelessness on the part of petitioner, its agents and servants, and as a direct result of such negligence and carelessness respondent was seriously and permanently injured as alleged in said amended petition (Tr., pp. 14 and 15).

The answer of petitioner (defendant below) to this amended petition was a general denial, together with allegations to the effect that the collision referred to in respondent's amended petition occurred in Indiana, and that there was then and there in force in said state a statute including Section 12931 of Volume III of Burns' Annotated Statutes of Indiana 1926, the sixth subdivision of which is as follows:

> "Sixth: To cross (intersection) (joint) and unite its railroad with any other railroad before con-

structed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

And said answer alleged that there was then and there in force in said state statutes known as Sections 13206, 13207 and 13208 of Volume III of Burns' Annotated Statutes of Indiana 1926, as follows:

"Section 13206. (Contracts Between Connecting Railroads). 1. All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon."

"Section 13207. (Contracts Ratified.) 2. All contracts heretofore made in good faith between railroad (companues) (organused) under the laws of this state, acting by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, are to be run and operated over the tracks

and road of another railroad company, are hereby ratified and made legal."

"Section 13208. (Liability to Third Persons.) 3. Every railroad that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

And it was alleged in said answer that prior to September 2, 1927, the Evansville, Indianapolis and Terre Haute Railway Company (hereinafter referred to as the Evansville Company) owned a railroad track which connected with petitioner's track at or about the place where said collision occurred; that prior to the construction of said track petitioner and said Evansville Company entered into a contract which was in force and effect at the time of said collision, by the terms of which it was provided that the connection between the latter's track and that of petitioner's should be made and that all switches, switching devices, signal devices and signal lights necessary and proper for the safe operation of said switches should be installed and maintained by said Evansville Company; that pursuant to said contract said connection was made and said switches and signal lights were installed and have been maintained at said point by said Evansville Company, and were so maintained at and prior

to the time of said collision; that on said September 2, 1927, as petitioner's train upon which respondent was riding approached said connection, the signal lights at said switch were so set as to show to petitioner's engineer in charge of the locomotive hauling said train that said switch was so set as to permit and require him to proceed without stopping at said switch, and that relying upon said signal said train proceeded at its usual and customary rate of speed; but that, in fact, said switch was so set as to turn petitioner's engine and train onto the track of said Evansville Company, upon which cars belonging to the latter company were standing, and with which petitioner's train was caused to collide; that through some defect or insufficiency in said signal light and the mechanism which controlled it, said light failed to disclose to defendant's said engineer the position of said switch, but on the contrary indicated that said switch was so set that petitioner's train would stay upon its track and would not be deflected to the track of the Evansville Company; and that the condition of said switch and light was not known to petitioner, its agents and employes in charge of its track and of its said locomotive, and could not have been discovered by them by the exercise of the degree of care required of them, and that said collision was not due to any negligence on the part of petitioner, its agents, servants and employes (Tr., pp. 16, 17).

Respondent's reply was a general denial (Tr., p. 19).

At the trial, respondent, as plaintiff below, adduced testimony showing that on the night of September 2, 1927, plaintiff was a passenger upon a west-bound train of petitioner enroute from Louisville, Kentucky, to St. Louis, Missouri; that about 1:30 on the following morning, when petitioner's train was a short distance from Princeton, Indiana, it came into violent collision with another train, by reason whereof plaintiff was hurled from the berth in which he was sleeping to the floor of the car, sustaining the injuries for which he sues (Tr., pp. 48 and 49). With this testimony, and that pertaining to the character, extent and permanency of plaintiff's injuries (Tr., pp. 30 to 47, inclusive, pp. 49 to 59, inclusive) respondent rested his case.

The testimony in behalf of defendant, aside from the testimony of medical experts which is not here pertinent (Tr., pp. 60 to 72, inclusive), tended to show that the collision in question occurred at a point on petitioner's line referred to as Mine Junction or Mine Switch, near Francisco, Indiana, at which point there was a switch connecting defendant's main line with the track of the Evansville Company. At that place petitioner's road extends approximately east and west, and the track of the Evansville Company connects therewith leading off toward the west on the south side of petitioner's track and curving to the south. This track of the Evansville Company extends back to a mine about three-quarters of a mile distant, and from the point of this switch connection

the Evansville Company operated its trains and cars eastwardly over petitioner's main line to Oakland City, a point six or seven miles east thereof, under a contract and working arrangement with the petitioner. At Oakland City there was another connection with the Evansville Company's track (Tr., p. 73). At the Mine Junction switch there was a switch stand operated in conjunction with a signal light upon a tall stand which stood across the track from the switch stand and was connected therewith by a throw rod so that when the switch lever was operated the light stand would be turned so as to change the light from green to red, or vice versa, when the mechanism was operating normally.

On the night of September 2nd, about thirty or thirty-five minutes prior to the collision in question, according to defendant's evidence, a freight train of the Evansville Company, which had been operated between Mine Junction switch point and said mine, was standing on the switch track leading off from this switch. It was the intention of the crew to take the train east over petitioner's track to Oakland City. The crew consisted of one Hughes, who was the conductor, an engineer, a fireman and two brakemen, namely, one Carson and one Stanley (Tr., pp. 73, 74). The freight train was headed east, the engine being in front of the train and two or three car lengths from said switch connecting that track with petitioner's main line (Tr., p. 76). While it was standing in that position one of petitioner's freight trains, an

extra, passed, going west. Hughes, the conductor of the freight train of the Evansville Company, testified that after petitioner's extra freight had passed, he went into a telephone booth nearby and called petitioner's train dispatcher at Preston for running orders to Oakland City; at which time both of the brakemen were there close to him; that the dispatcher gave him running orders to Oakland, and that he then said to Corson, one of the brakemen, "all right"; but that he then thought about No. 2 passenger train—the train upon which respondent was a passenger—and looked at his watch and saw that they did not have much time to make it to Oakland City before No. 2 would arrive there, whereupon he told Carson to ask the engineer "if he could make Oakland City for No. 2" (Tr., p. 75); that Corson went and made this inquiry of the engineer and came back and said, "No," and that he (Hughes) then called the dispatcher again and told him they would remain where they were until No. 2 had passed (Tr., p. 75). And Hughes said that when he came out of the booth he looked at the switch light and target and they showed green, indicating a clear track on petitioner's line, and he then walked a few feet away and sat down and remained there until the passenger train arrived and "hit the switch"—"took the switch"—and went into the freight train of the Evansville Company standing on the side track (Tr., pp. 75 and 76). Hughes said that there were six or seven cars on the passenger train and all of them went in on the

siding but the rear car, the rear trucks of which were sitting right on the switch points; and that when they went back to the switch they found that the throw rod had become disconnected from the bottom of the switch stand; that the throw bar had dropped down at the bottom, and if it had not been disconnected the light would have shown red (Tr., p. 78).

On cross-examination Hughes said that the brakeman Carson left the switch open, thinking they were going to use the Southern tracks, and that during the entire twenty or twenty-five minutes the witness and his crew were right there in the vicinity, and that during that entire time the switch, which should have been closed in order to permit the Southern train to go through, was allowed to remain open (Tr., p. 79). And he said that Carson could have told whether the switch was closed or not by looking at the switch points; that he knew that the Southern passenger train was due in a short time; that it was customary for the Evansville Company to use the Southern tracks and for employes of that company to open and close the switches as they saw fit, and as they thought necessary (Tr., p. 81).

Carson, as defendant's witness, testified that he unlocked and opened the switch in question when Hughes called to him, saying, "All right," after the latter had called up the train dispatcher; that this meant that they were to go ahead to Oakland City on the Southern track ahead of No. 2; that when he (Carson) unlocked the switch and threw

it, the points fitted up all right, but he paid no attention to the light, "which was on the other side, about fifteen feet high" (Tr., p. 87); that when he got the switch in line, Hughes said: "No. 2 is on time, ask the engineer if we can make it to Oakland"; and that he (Carson) then went to the engine on the sidetrack, about three car lengths west of the switch point, asked the engineer if they could make it to Oakland, and that the engineer said: "We better not try it." And Carson testified:

> "I turned around, with nothing on my mind but lining that switch up; first thing I noticed was a green switch light; well, I would have knowed there was something wrong if I hadn't left the conductor out ahead and brakeman beyond, and I just figured one of them had lined it back, see?" (Tr., p. 88.)
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> "Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch; never thought practically anything about it; just thinking one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was" (Tr., p. 88).

On cross-examination this witness testified that when he opened the switch he looked at the switch points, but paid no attention to the light. He further testified that any other sort of examination, when he walked back from the engine, if he had made it, would have determined, absolutely, the fact that the switch was open for the South-

ern train, but that he "just crossed over the track and walked up the other side of the track and sat down"; that he had plenty of time to look at the switch points if he had wanted to (Tr., p. 91); that the switch light involved was a "Southern light," and was on Southern property (Tr., pp. 94 and 95).

Stanley, the other brakeman, testified that after the wreck he found the switch open and the light showing green and, upon examining the light standard, he found the connecting rod off the target rod (Tr., p. 93).

One **Vieth**, petitioner's supervisor of bridges and buildings, testified that he was on train No. 2; that after the collision the switch lever was in proper position for the switch to be open to the siding; that after daybreak he made an examination and found that the lever or crank of the light stand was fastened to the connecting rod but was off of the upright (Tr., p. 99). He made a rough drawing of the "crank" that connected the throw rod with the upright of the light stand, introduced as Petitioner's Exhibit 3 (Tr., p. 135), but his testimony (Tr., pp. 99 to 102, inclusive) is such as to make it impossible to identify the various things in such drawing to which he referred from time to time by saying "this," "here," etc. (indicating); that he observed a fresh crack in the crank, about opposite the set screw which held it to the upright of the light stand, and said that this crank would take the tension off the sides and finally let the crank drop off (Tr., p. 101).

On cross-examination, referring to the set screw designed to hold the crank to the upright, he said that it "was in there about one-sixteenth of an inch." He said that the set screw "had protruded" far enough to hold; that the thing could have been prevented by having a bolt hole drilled through the bottom of the shaft, according to a "design" referred to, with the crank properly secured to the shaft by means of a bolt; that "by drilling a bolt hole in there, according to the design, and the crank properly secured to the shaft by means of a bolt, that would have prevented this sort of occurrence"; and that another way they could have prevented it "would be by having the counter bore in the shaft properly countered or centered, so as to receive this set screw" (Tr., pp. 104, 105).

One **Beard**, the conductor of petitioner's train that was wrecked, testified that after the casualty he looked about to find out why the light did not show red, and found that the rod that went over to connect with the upright of the switch light was disconnected at the bottom (Tr., p. 107); that he put his hand under there and found that the set screw was at least one-sixteenth of an inch inside; that he tried to turn the set screw with his fingers, but it was rusted and would not turn.

One **Larson**, defendant's section foreman, whose duty it was to inspect the switches once a week, testified that he inspected this switch on September 2nd and did not discover anything out of order (Tr., pp. 110, 111). On cross-

examination he said that two or three days, or perhaps one day, before the casualty he found that the bridle rod at this switch, which was fastened to the switch points, and operated them, had been bent and damaged by something dragging on a train, and that the throw rod attached to the switch stand had also been damaged, and he took it off (Tr., pp. 111 and 112).

Petitioner offered in evidence the contract between it and the Evansville Company respecting the connection at Mine Point Junction, but on objection of plaintiff's counsel it was excluded (Tr., p. 115). The same is set out on pages 115 to 124 of petitioner's transcript.

Petitioner also introduced in evidence the sections of the Indiana statute pleaded in the answer.

III.

SUMMARY OF ARGUMENT.

POINT 1.

(a)

The evidence adduced by respondent, showing that he was a passenger on petitioner's train and was injured, without fault on his part, by reason of the train running into a siding or switch track and coming into collision with another train standing thereon, made a prima facie case of negligence on the part of petitioner, under the res ipsa loquitur rule, and cast the burden on petitioner to

show that such collision and injury resulted from inevitable accident or some cause against which human care and foresight could not have provided.

Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115;
N. J. R. & T. Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877;
Gleeson v. Va. Midland Ry. Co., 140 U. S. 370, 35 L. Ed. 458;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, l. c. 663, 45 L. Ed. 361, l. c. 364;
Sweeney v. Erving, 228 U. S. 233, 57 L. Ed. 815;
Kirkendall v. Union Pacific R. Co., 200 Fed. 197;
Murphy v. Milford, A. & W. St. Ry. Co., 210 Fed. 137, 138;
Patterson v. Traction Co., 213 Fed. 289, 291;
Lee Line Steamers v. Robinson, 218 Fed. 559, 563;
Lee v. K. C. So. Ry. Co., 220 Fed. 863;
Wiley v. Grand Trunk Ry., 227 Fed. 127, 129;
Chicago, R. I. & P. Ry. Co. v. Eddy, 228 Fed. 643, 645;
Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562;
So. Pac. Co. v. Hanlon, 9 Fed. (2d) 294;
Lehigh Valley R. Co. v. Ciechowski, 10 Fed. (2d) 82 (certiorari denied 270 U. S. 654, 70 L. Ed. 783).

(b)

The evidence adduced by petitioner did not and could not overthrow respondent's prima facie case so as to warrant a directed verdict. When all the evidence was in, it was for the jury to say whether the petitioner had rebutted

respondent's prima facie case. The explanations sought to be made by petitioner were matters of defense for the consideration of the jury.

Gleeson v. Railroad Company, supra, 140 U. S. 370, 35 L. Ed. 458;
Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562, 567, 569;
Lehigh Valley R. Co. v. Ciechowski, 10 Fed. (2d) 83, 84;
Chicago, R. I. & P. Ry. Co. v. Eddy, 228 Fed. 643, 647;
And other authorities cited under Point 1 (a), supra.

POINT 2.

Under the evidence adduced, showing that petitioner, under its working arrangement with the Evansville, Indianapolis & Terre Haute Railway Company, with respect to the connection at Mine Point Junction, undertook to delegate to the latter company the duty to attend, manage and operate the switch and signal light in question, which constituted an integral part of petitioner's road, the operation of which affected the safety and security of petitioner's track for the transportation of its passengers, petitioner is liable for injuries to its own passengers due to the negligence of the agents and servants of such other company in the operation and management of such switch and signal light, as though such agents and employes were its own agents and employes, and regardless of the terms of the operating contract or arrangement

between the two companies and of the Indiana Statutes relied upon by petitioner.

Illinois Central R. Co. v. Barron, 5 Wall. 90, 72 U. S. 412, 18 L. Ed. 591;
McElroy v. Nashua etc. R. Co., 4 Cush. (Mass.) 400;
Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77;
Chicago Rys. Co. v. Kramer, 234 Fed. 245;
Penn. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
Maumee Valley R. etc. Co. v. Montgomery, 81 Ohio St. 426, 91 N. E. 181, 26 L. R. A. (n. s.) 987;
Quigley v. Toledo Rys. & Light Co., 89 Ohio St. 68;
Nelson v. Vt. etc. R. Co., 26 Vt. 717;
Murray v. Lehigh Valley R. Co., 66 Conn. 512, 32 L. R. A. 539;
Biddle v. Riley, 11[illegible]k. 206, 176 S. W. 134, L. R. A. 1915 F 192;
Central Trust Co. v. D. & R. G. R. Co., 97 Fed. 239, 242;
Eddy v. Letcher, 57 Fed. 115;
Union Pac. Ry. Co. v. Harris, 63 Fed. 801, 158 U. S. 326, 39 L. Ed. 1003;
Keep v. Railway, 10 Fed. 454;
10 Corpus Juris, pp. 879, 880, Sec. 13[illegible]6.

POINT 3.

The testimony adduced by petitioner afforded ample proof of its own negligence in respect to the equipment and maintenance of the mechanism of the switch stand and signal light at the switch point in question, directly affecting the safety and security of the track over which

petitioner undertook to transport respondent as a passenger, in that such testimony showed that petitioner relied upon old equipment, with a rusty set screw to hold the "crank" to the shaft or upright of the signal light, by friction merely, when such connection could have been safely and securely made by merely counterboring such shaft where the set screw protruded, or by putting a bolt through the shaft according to the design referred to at the trial (Tr., pp. 104, 105). The jury was not required to believe the testimony as to a crack in the crank. And there was such crack, and if that had aught to do with the connecting rod becoming loose from the upright of the light standard, under the testimony adduced the jury was well warranted in finding that such crack occurred a day or two prior to the casualty when the bridle rod and one of the throw rods were damaged by something dragging on the track, and that a reasonable and proper inspection would have revealed the same (Tr., pp. 111-112).

Furthermore, the connection could have been made absolutely safe, regardless of any such crack, by the simple means mentioned above (Tr., pp. 104, 105).

POINT 4.

The authorities relied upon by petitioner involving the question of liability of a lessor railroad company for the negligent operation of a road or portion thereof leased to the latter, where such lessor, by legislative authority, leases its entire road or some portion thereof with roll-

ing stock and equipment and parts with the possession and control thereof (e. g., Arrowsmith v. Railroad, 57 Fed. 165, and cases following the same; Moorshead v. United Railways Co., 119 Mo. App. 541, and other cases of like character), have naught to do with the question here involved, but are far afield. Nor are any of petitioner's other cases here in point, since none of them involve the question of the liability of a railroad company to its own passengers for injuries received as a result of the negligent maintenance or operation of an appliance or mechanism constituting an integral part of such carrier's road, the negligent maintenance or operation of which would necessarily imperil the safety of passengers being transported by it over such road.

POINT 5.

There is a wide distinction between a case in which the lessor company, by an authorized lease, parts with complete possession and control of its road, and one in which, by lease or otherwise, there is a joint or common use of such road or a portion thereof by the two companies.

1 Elliott on Railroads (3d Ed.), Sec. 533, p. 770, Section 541, p. 779.

IV.

ARGUMENT.

(1)

This is a simple case involving liability of a common carrier by railroad to its own passenger for injuries sustained by the passenger in a collision due to the carrier's negligence. Petitioner undertook to transport respondent safely from Louisville, Kentucky, to St. Louis, Missouri, and while respondent was a passenger upon petitioner's train the train was allowed to run into a switch negligently permitted to remain open on petitioner's main-line track, by reason whereof the train took a sidetrack and came into violent collision with an engine and train of freight cars, resulting in respondent's injuries.

Nothing is better settled in the law than that in passenger and carrier cases proof of a collision or derailment of the train or car upon which the passenger is riding, resulting in injury to him, constitutes prima facie evidence of negligence on the part of the carrier, under the res ipsa loquitur rule, and casts the burden upon the carrier to show that such injury resulted from inevitable accident or some cause against which human care and foresight could not have provided. And in such cases not only does proof of the occurrence itself cast upon the defendant carrier the burden to exculpate itself, to show that its whole duty was performed and that the injury could not have been

avoided by the highest degree of care on its part—by the utmost human care and foresight—**but when the injured passenger, as plaintiff, has thus made out his prima facie case, and the defendant carrier comes forward, if it does, with evidence for the purpose of explaining the casualty and attempting to exonerate itself, the case remains one for the jury.** Though the plaintiff adduces evidence merely to show the relation between passenger and carrier, the occurrence itself, and his consequent injury without negligence on his part, and though the evidence in behalf of the defendant carrier tending to exonerate it stands uncontradicted, a verdict will not be directed for the defendant, but the issue of liability is one for the jury under all the evidence. Such is the applicable rule of law, firmly established by the decisions of this and other courts.

In **Gleeson v. Virginia Midland Railroad Co.**, 140 U. S. 443, 35 L. Ed. 548, this Honorable Court said:

> "Since the decisions in Stokes v. Saltonstall, 13 Pet. 181 (10 L. Ed. 115), and Railroad Company v. Pollard, 22 Wall. 341 (22 L. Ed. 877), it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Inland & Seaboard

Coasting Co. v. Tolson, 139 U. S. 551 (11 Sup. Ct. 653, 35 L. Ed. 270)."

* * * * * * *

"The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matters of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

The Gleeson case and the authorities there cited have been followed time and again by the federal courts. (See Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562, l. c. 568, 569; Lehigh Valley R. Co. v. Ciechowski, 10 Fed. [2d] 82, l. c. 84, and other authorities cited under point 1 of respondent's summary of argument, supra.)

In the instant case respondent made out his prima facie case by showing the relation of passenger and carrier, the collision and his consequent injury. Petitioner adduced evidence in an effort to rebut the prima facie case of negligence so made. If it be assumed, arguendo, such evi-

dence tended to exculpate petitioner, in that it tended to show that the injury was occasioned by no negligence or breach of duty on its part or on the part of those for whose acts it was responsible (which respondent stoutly denies), respondent submits that under the law applicable to that situation petitioner was not in any event entitled to a directed verdict; that it was for the jury to believe or disbelieve the testimony of petitioner's witnesses by way of explanation, and that when all of the evidence was in it remained for the jury, guided by the Court's charge, to say whether petitioner had rebutted respondent's prima facie case.

(2)

But, respondent submits, the evidence adduced by petitioner, instead of tending to acquit it of negligence, affirmatively established negligence on its own part in negligently maintaining the switch and signal mechanism at the point in question in an unsafe condition for operation, as well as the plainest sort of negligence on the part of the agents and servants of the Evansville, Indianapolis & Terre Haute Railway Company, for whose negligence, respondent contends, petitioner is clearly liable under the circumstances of the case. We desire, first, to direct the Court's attention to some of the pertinent matters developed by petitioner's evidence showing the negligence of the agents and servants of the Evansville Company in the operation of this switch and signal device.

About half an hour before petitioner's passenger train No. 2, on which respondent was a passenger, was due at Mine Junction, the crew of the freight train of the Evansville Company, then standing on the switch or side track at that point near petitioner's main-line track, were ready to proceed eastwardly over petitioner's main track to Oakland City. Hughes, conductor of that freight train, telephoned to defendant's train dispatcher, who issued orders for the running of the trains of the Evansville Company over the road as well as those of defendant, asking for running orders to Oakland City. This was just after one of petitioner's through freight trains had passed going west. Hughes was given such running orders and at once called to Carson, a brakeman, saying, "All right"; whereupon Carson proceeded to throw the switch lever and open the switch leading to the side track. Hughes then immediately told Carson to ask the engineer if he had time to make it to Oakland City, and Carson at once walked to the engine, not more than three car lengths away, made such inquiry, and was told by the engineer that he did not think that they had time to make it, **whereupon Carson immediately turned around and observed that the light on the switch stand showed green, but paid no more attention to the switch which he had just opened.** Without examining the switch points to see if the switch had been in fact closed, and without asking whether anyone else had closed the switch, he calmly sat down and waited until the wreck occurred. Indeed, he said that when he turned and saw

that the light was green—when it should have been red as he had just opened the switch—**he never thought practically anything about it.**

After opening the switch and being told to speak to the engineer, it could have taken Carson but a few seconds to reach the engineer. He says that when he turned around and observed that the light signal showed green he thought that someone else must have thrown the switch back and closed it. Just how he could have thought this, in view of the fact that he had just opened the switch at the conductor's order, both of them expecting the train to go, and neither the conductor nor the other brakeman could have known that they were not going to pull out upon the main track until Carson reported what the engineer had to say. Having had Carson open the switch and having sent him to get the engineer's opinion as to whether they could make it to Oakland City, certainly the conductor would not have closed the switch, nor would he have had anyone else close it while Carson was walking to the engine. And though the open switch was a deadly menace and did, according to this record, cost at least two lives, as well as injuries to others, neither Carson nor Hughes paid any attention whatsoever to the fact that ought to have been obvious to anyone, that the green light under the circumstances plainly indicated that something had gone wrong with the switch mechanism.

Hughes likewise observed that the light was green, whereas he had just had Carson open the switch, but he

also dismissed the matter from his mind. Neither of them looked at the switch points or made the slightest investigation. Obviously, the situation was enough to have suggested to any reasonably prudent man the necessity of looking to see whether or not this switch was, in fact, closed in order to insure the safety of trains moving on the main track. Having opened the switch, it was their imperative duty to see that it was closed.

As to the negligence of these employes the Court of Appeals, in its opinion, said:

> "The circumstances are that, a while after the switch was opened, the conductor and the brakeman (who had opened the switch) each looked at the light and it evidenced that the switch had been closed, while the second brakeman, who was with them near the switch, made no satisfactory explanation as to why he did not close the switch. It was a fair question whether any of these three men exercised the highest degree of care in protecting the switch."

(3)

But it is the contention of petitioner that it is not responsible for the negligence of the agents and servants of the Evansville Company. This contention, respondent submits, is wholly without merit. As a carrier of passengers, petitioner was bound to exercise the highest degree of care and the utmost diligence, not only in the care and management of the train on which petitioner was a passenger, the

maintenance of its track and roadbed, but in the maintenance and operation of all incidental and subsidiary appliances, equipment and arrangements appurtenant to its road and connected and used therewith, having to do with the safety of the carriage of passengers which it undertook to transport. As the switch stand, signal device and connecting mechanism constituted an integral and important part of petitioner's road and equipment, and the proper maintenance and operation thereof were obviously essential to the safety and security of the passengers which petitioner undertook to carry over its main track, it was petitioner's duty, and petitioner was charged with the highest degree of care and foresight to see that the switch stand and signal light were not only properly and safely maintained in good working order, but properly attended, managed and operated, to the end of securing the safety of passengers on its trains passing over its road at this point. This duty petitioner could not shift or delegate so as to relieve itself of liability by reason of its nonperformance. And no contract or operating or working arrangement between petitioner and any other company, whereby the latter was permitted to use and operate this switch and signal device in connection with its operation of a portion of petitioner's road or otherwise, could, by any possibility, relieve petitioner from the duty owing to its passengers to see to the proper operation and management thereof. And when petitioner undertook to leave the operation of this switch and signal device to the em-

ployes of the Evansville Company, it made such employes, in legal effect, its own agents and employes for that purpose, making petitioner liable for the acts of such employes precisely as though they were its own agents and employes. The law anent that matter does ont, respondent submits, rest in any doubt whatsoever.

In the leading case of Illinois Central Railroad Company v. Barron, 5 Wall. 90, 18 L. Ed. 590, the deceased, for whose death the action was brought, was a passenger on a car of the defendant Illinois Central Railroad Company, and was killed by reason of a collision between that car and an express train of the Michigan Central Railroad Company. The defendant Illinois Central was the owner of the road and was transporting plaintiff as a passenger thereon, but had "contracted or leased to the Michigan Central the privilege of running trains on that part of its road. This Court, in its opinion, said:

> "It was insisted at the trial, in behalf of the defendants, that the express train was wholly in fault and responsible for the injury. But the Court ruled that, considering the facts to be as claimed, still the defendants were liable, and this presents the first question in the case.
>
> "It will be observed the defendants owned the road upon which they were running the car in which deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission.
>
> "The question is not whether the Michigan company

> is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable (citing Illinois cases). The same principle has been affirmed in other states (Nelson v. Vt. etc. R. Co., 26 Vt. 717; McElroy v. Nashua etc. R. Co., 4 Cush. 400)."

Petitioner, in its brief, seeks to make it appear that this Court, in the Barron case, supra, simply applied the local law of Illinois, holding a lessor road liable for the negligent operation thereof by a lessee where the Legislature had not expressly or impliedly given railroad companies authority to lease their roads and relieve themselves from liability. But, as pointed out in the Court of Appeals in its opinion in this case, this Court, in the Barron case, referred to three Illinois decisions, in only one of which (Ohio etc. R. R. Co. v. Dunbar, 20 Ill. 623) was the decision based upon the ground that the contract of the railroad with the other carrier was made without legislative consent. And in the Barron case this Court cited two decisions from other states, namely, Nelson v. Railroad, 26 Vt. 717, and McElroy v. Railroad, 4 Cush. (Mass.) 400, to which we shall later refer. And the Court of Appeals, in the instant case, said:

> "It is therefore clear that the approval in the Barron opinion could not have been based solely upon lack of legislative consent to a lease."

The rule of law underlying the Barron case has been recognized and applied in many other cases. (See Central Trust Co. of New York v. Colorado Midland Ry. Co., 97 Fed. 239, affirming 89 Fed. 560; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 745, and other authorities under point 2 of respondent's summary of argument, supra.)

The Court of Appeals, in the instant case, quoted from the opinion of Judge (later Justice) Brewer in the Colorado Midland case, 89 Fed. 563, as well as from the opinion of the Court of Appeals in the same case, 97 Fed. 239 (Tr., pp. 156, 157).

The Barron case, supra, and the Colorado Midland and Roller cases, and other cases that have followed the Barron case, were cases involving the **joint or common use of a track by two roads**, where the owning company did not lease the entire road and surrender all possession and control thereof to the lessee but continued to operate its own trains and carry its own passengers over the road. And the courts have consistently held that the owning road is liable to its own passengers so transported by it, due to the negligence of the road jointly occupying the track with it. There is a very marked distinction between cases of the character just mentioned and those in which it is sought to hold a lessor company liable, where, by an authorized lease, it leases its road to another company and surrenders all possession and control thereof. (See 1 Elliot on Railroads [3rd Ed.], Sec. 551, p. 779.)

Petitioner, in the Court of Appeals, placed much reliance

upon the decision in Arrowsmith v. N. & D. R. Co., 57 Fed. 165, Moorshead v. United Railways Co., 119 Mo. App. 541, and other cases of like character, which cases are now cited and relied upon by petitioner in its brief. These are cases involving the liability vel non of a lessor railroad company which leases its entire road and equipment to another company, surrendering all possession and control thereof, such lease being authorized by legislative authority. The question of the liability of the lessor company in such cases for negligent operation by the lessee is a matter that is in nowise involved in the instant case. There is a conflict of authority as to whether, in such cases, the lessor, surrendering full possession and control, can escape liability for negligent operation by the lessee, though such lease is made with legislative sanction, where the Legislature has not expressly exempted the lessor from liability. (See Quigley v. Toledo Rys. & Light Co., 87 Ohio St. 68, 105 N. E. 185, L. R. A. 1918-E, 249.) But since the question is not one here involved, it would serve no useful purpose to discuss these cases.

(5)

In this connection, much is said by petitioner in its brief as to the effect of the Indiana statutes pleaded. At this point respondent desires to point out that Sections 12808, 13106 and 13079, Burns' Indiana Statutes 1926, set out on pages 45, 46 and 47 of petitioner's brief, were not pleaded in petitioner's answer below and were not, of

course, offered in evidence, and are not in this case. The sections of the Indiana statute pleaded are Sections 12931, 13206, 13207 and 13208 of Burns' Annotated Statutes 1926 (pages 16 and 17). As to the effect of these sections, it may be said, for one thing, that since this petitioner is a Virginia corporation (Tr., p. 9) and not a corporation under the laws of the State of Indiana, and since the Indiana statutes pleaded are statutes providing for the incorporation of railroad companies under the laws of that state, prescribing their powers, etc., it is difficult to see how the rights or liability of petitioner are in any way affected by such statutes. But if we assume that under such statutes petitioner was required to permit another railroad company to connect with its line, **it is entirely obvious that these statutes did not and could not by any possibility relieve petitioner from liability to its own passengers by reason of the negligent operation of a switch and signal device necessary to the safe operation of petitioner's trains.**

Assuming that petitioner was required to afford another road a connection at Mine Junction, neither the Indiana law nor any other law contemplated or could contemplate that petitioner would have the right to turn over to the employes of such another road, or to anyone else, the duty to operate its switch and signal device on its own main-line track, for the operation of its own trains, carrying its own passengers, without being liable to its passengers for the negligent operation of such device, just as though the persons operating it were its own employes.

The case at bar is, indeed, a much stronger one than the Barron case, the Colorado Midland case or the Roller case referred to above. Here the injury did not occur through **the negligent operation of a train** by a railroad having running rights on the road, but **occurred through the negligent maintenance and operation of petitioner's own switch stand and signal device, constituting as much an integral part of its road as did the rails, roadbed or bridges.**

The case of **McElroy v. Railroad**, 4 Cush. (Mass.) 400, is here directly in point, or, as the Court of Appeals in its opinion herein said, is "on all fours" with this case (Tr., p. 155). In that case the casualty occurred by reason of the negligent operation of a switch, which, under an arrangement between the defendant and another road, was provided for and attended by a servant of the latter company at its expense. The Court said:

> "As passenger carriers the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendant's road, over which they must necessarily carry all their

passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed, before they were justified in carrying passengers over it."

Nelson v. Railroad, 26 Vt. 717, is a case of like character.

What is said by petitioner in its brief as to the powers of the Interstate Commerce Commission over railroads does not call for even passing notice. It is certain that neither under the laws of Indiana nor under any authority of the Interstate Commerce Commission was petitioner required to permit the switch and signal device in question to be operated by the employes of another road without any supervision or control thereover by petitioner. And, we submit, it is equally certain that when petitioner permitted the employes of another road to operate this switch, upon the proper operation of which depended the lives and safety of its own passengers, it made such employes for that purpose its own employes, and became liable for their negligent operation thereof.

(6)

But there is still another phase of this case which, respondent submits, disposes of all petitioner's contentions adversely to it. The evidence adduced by defendant

showed its own negligence in the maintenance and care of this switch and light signal mechanism. It was petitioner's own switch and signal stand on its own property (Tr., pp. 94, 95) and an essential part of its equipment. It was, in fact, maintained (though negligently maintained) by petitioner. Petitioner's employes inspected and repaired it (Tr., pp. 109-112, incl.). It is stated in petitioner's brief (Tr., p. 20) that the Evansville Company undertook to maintain "this connection" at its own cost and expense under the contract offered in evidence. This contract was excluded, for the obvious reason that it had no tendency to relieve petitioner of liability, but an examination thereof (Tr., pp. 115 to 124, incl.) will reveal that there is no provision therein requiring the Evansville Company to maintain and keep in order the switch and light stands and their connecting mechanism. The duty of this petitioner to its passengers was to exercise the highest degree of care, the utmost human diligence and foresight, to keep this this appliance in good and safe working order at all times. The evidence shows, however, that at the point beneath the light standard where the connection was made between the so-called crank and the upright of the standard, petitioner relied upon this connection being securely and firmly made by having a little set screw to hold the crank to the upright by friction merely, and that the equipment was old, rusty and out of date. And petitioner's expert witness, Vieth, testified positively that the occurrence in question could have been avoided by simply having the upright

or shaft, to which the crank fitted, countersunk beneath the set screw; and that the casualty could have been avoided by boring a little hole into the shaft and putting in a bolt, in accordance with the design referred to at the trial, whereby a firm connection would have been absolutely assured. Touching this matter the Court of Appeals, in its opinion in this case, aptly said:

> "The direct negligence of the appellant was in the maintenance of a safe appliance at the switch so that the switch light would turn to indicate the condition at that point. It was a vital matter that the switch light should indicate this condition. And the evidence showed that the appliance had been long in use and could very easily have been made safe and that, if it had been so constructed, the accident would not have occurred" (Tr., pp. 158, 159).

In petitioner's brief, page 22, it is said that investigation revealed that the failure of the signal to operate properly was due to a fresh "break" in the connection between the light standard and the lever which opens and shuts the switch. We wish to respectfully call attention to the fact that there is no evidence whatsoever of any break in the connecting rod, crank, or other part of the mechanism. Indeed, the word "break" nowhere appears in the testimony. All of the testimony is that the lever or crank at the base of the light standard was disconnected from the upright. It was fastened to the connecting rod, but was off of the upright. (Tr., pp. 93,

99, 107). Neither the crank (or lever) or connecting rod was broken. The witness Vieth, an employe of petitioner, testified that he found a fresh crack in the crank. What this crack amounted to, if it existed at all, is not shown. The crank was not brought into court and exhibited. The testimony as to the existence of the crack was that of an interested witness. And there is no evidence other than the opinion of this witness that such a crack could have caused the crank to drop off, and certainly none that it did cause it to do so. If the crack existed at all it was a pure matter of speculation as to whether it had anything to do with the crank becoming disconnected from the upright of the light standard. If such testimony may be said to have any probative force, it was for the jury to believe or disbelieve it, or to give such weight thereto as the jury might see fit. Furthermore, since the evidence showed that a great deal of damage had been done to this mechanism a day or two prior to the casualty, the bridle bars and one connecting rod being damaged, the jury could well infer that if there was any such crack it was caused at that time and that a proper inspection would have revealed it.

But apart from all this, the testimony of the witness Vieth, on cross-examination, is to the effect that, despite any such crack, **this connection could have been firmly and securely made by simply counter-boring the shaft or upright, or by putting in a small bolt to make the connection firm and safe.** Is it, we ask, the exercise of the

highest degree of care, the utmost human diligence and foresight, for the safety of passengers, to use an old, out-of-date signal device in which a vital connection is made by a rusty set screw, holding by friction merely, when there are simple and absolutely safe means at hand for making such connection firm and secure? Obviously, as the Court of Appeals held, the question of defendant's own negligence in the maintenance of this appliance was one for the jury.

Respondent submits that the learned author of the opinion of the Court of Appeals has fully and correctly disposed of every contention of petitioner (Tr., pp. 151-159); and that, indeed, all such contentions were likewise completely disposed of by the memorandum of the learned District Judge before whom this case was tried below, in ruling upon petitioner's motion for a new trial (Tr., pp. 145-148).

For the reasons shown above, respondent prays that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

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